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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,)	CR. NO. S-05-240 GEB
)	
12 Plaintiff,)	GOVERNMENT'S SUPPLEMENTAL
)	BRIEF RE: DEFENDANTS' MOTION
13 v.)	FOR RECONSIDERATION REGARDING
)	RELEASE ON BOND
14 HAMID HAYAT, and)	
15 UMER HAYAT,)	
)	
16 Defendants.)	

17
18 I. IT WOULD BE IMPROPER FOR THIS COURT TO REVISIT
19 MAGISTRATE JUDGE NOWINSKI'S DETENTION ORDER

20 This court has suggested that it may inquire into the propriety
21 of that portion of Magistrate Judge Nowinski's order which finds
22 that the defendants are a danger to the community. Before
23 addressing the substance of that issue, the government respectfully
24 submits that it would be improper for the court to revisit that
25 issue. As noted in the government's opening brief, the Bail Reform
26 Act states that a decision relating to detention may be reopened
27 only if "the judicial officer finds that information exists that was
28 not known to the movant at the time of the hearing and has a

1 material bearing on the issue whether there are conditions of
2 release that will reasonably assure the appearance of such person as
3 required and the safety of any other person and the community." 18
4 U.S.C. §3142(f). A belief that the decision of a prior judge was
5 legally incorrect does not fit within this description, nor the
6 similar requirements of Local Rule Crim 12-430(i). If the
7 defendants believed they had a legal basis for challenging
8 Magistrate Judge Nowinski's detention order, their remedy was to
9 appeal that decision to the district court. Local Rule Crim. 12-
10 430(j).

11 II. MAGISTRATE JUDGE NOWINSKI PROPERLY DETAINED
12 THE DEFENDANTS ON FLIGHT AND DANGEROUSNESS GROUNDS

13 A. The Court Is Required to Consider Dangerousness Even
14 Where the Crime Charged Is Not A "Crime of Violence"

15 The structure and plain language of the Bail Reform Act set
16 forth a two-step process for determinations of detention. The first
17 step is found in subsection (f), which provides that the Court can
18 consider detention only when one of six enumerated threshold factors
19 are present. The second step is found in subsection (g), which
20 provides that, if a threshold factor is present, the Court should
21 hold a hearing at which all the factors in subsection (g) shall be
22 considered in determining if any combination of conditions will
23 reasonably assure the appearance of the person and the safety of any
24 other person and the community.

25 The six enumerated threshold factors are as follows:

- 26 (1) a crime of violence; § 3142(f)(1)(A)
- 27 (2) an offense for which the maximum sentence is life
28 imprisonment or death; § 3142(f)(1)(B)
- (3) an offense for which a maximum term of imprisonment
of ten years or more is prescribed in the Controlled

1 Substances Act (21 U.S.C. 801 et seq.), the
2 Controlled Substances Import and Export Act (21
3 U.S.C. 951 et seq.), or the Maritime Drug Law
4 Enforcement Act (46 U.S.C. App. 1901 et seq.); §
5 3142(f)(1)(C)

6 (4) any felony if such person has been convicted of two
7 or more offenses described in subparagraphs (A)
8 through (C) of this paragraph, or two or more State
9 or local offenses that would have been offenses
10 described in subparagraphs (A) through (C) of this
11 paragraph if a circumstance giving rise to Federal
12 jurisdiction had existed, or a combination of such
13 offenses; § 3142(f)(1)(D)

14 (5) a serious risk that such person will flee;
15 § 3142(f)(2)(A)

16 (6) a serious risk that such person will obstruct or
17 attempt to obstruct justice, or threaten, injure, or
18 intimidate, or attempt to threaten, injure, or
19 intimidate, a prospective witness or juror. §
20 3142(f)(2)(B)

21 18 U.S.C. § 3142(f) (emphasis added).

22 The statute indicates that, in order to conduct a detention
23 hearing, the Court must look at the overall case and find that one
24 of these 6 enumerated factors is present. The Court can find anyone
25 of the six factors. For example, the Court may find "risk of
26 flight" based on a prior conviction, or a demonstrated flagrant
27 disregard for prior court orders of periods of supervision, such as
28 probation or parole. It may find a risk of obstruction of justice,
or it may find that the defendant's criminal history involves two or
more qualifying prior convictions. If any one of the six factors is
present, the Court can proceed to hold a hearing on the issue of
detention.

At the hearing, the Court "shall" consider the factors
outlined in subsection (g). Those factors are:

- (1) The nature and circumstances of the offense charged,
including whether the offense is a crime of violence
or involves a narcotic drug;

- 1 (2) the weight of the evidence against the person;
- 2 (3) the history and characteristics of the person,
3 including--
4 (A) the person's character, physical and mental
5 condition, family ties, employment, financial
6 resources, length of residence in the community,
7 community ties, past conduct, history relating
8 to drug or alcohol abuse, criminal history, and
9 record concerning appearance at court
proceedings; and
(B) whether, at the time of the current offense
or arrest, the person was on probation, on
parole, or on other release pending trial,
sentencing, appeal, or completion of sentence
for an offense under Federal, State, or local
law; and
- 10 (4) the nature and seriousness of the danger to any
11 person or the community that would be posed by the
12 person's release.

12 18 U.S.C. § 3142(g) (emphasis added).

13 Once the factors outlined in subsection (g) have been
14 considered, the court should make the findings outlined in
15 subsection (e), i.e., whether conditions will reasonably assure the
16 appearance of the person as required and the safety of any other
17 person and the community. 18 U.S.C. § 3142 (e). The Court "shall"
18 consider dangerousness to the community in doing so.

19 Hence, the first task of the judicial officer is to determine
20 if one of six circumstances exist which trigger a detention hearing.
21 Absent one of these circumstances, detention is not an option.
22 Second, assuming a hearing is appropriate, the judicial officer must
23 consider several enumerated factors to determine whether conditions
24 short of detention will 'reasonably assure the appearance of the
25 person as required and the safety of any other person and the
26 community.' 18 U.S.C. § 3142(g).

27 The Ninth Circuit, as well as other Circuits, have uniformly
28 held that the Bail Reform Act does not authorize pretrial detention

1 based solely on a finding of dangerousness. United States v. Twine,
2 344 F.3d 987 (9th Cir. 2003) (noting that "Our interpretation is in
3 accord with our sister circuits who have ruled on this issue. See
4 United States v. Byrd, 969 F.2d 106 (5th Cir. 1992); United States
5 v. Ploof, 851 F.2d 7 (1st Cir.1988); United States v. Himler, 797
6 F.2d 156 (3d Cir. 1986).

7 The Ninth Circuit has not expressly indicated what factors
8 would trigger a detention hearing and, ultimately can support a
9 detention decision. Other Circuits, including those cited as
10 authority by the Ninth Circuit, have reached this issue. These
11 courts have uniformly held that a detention hearing is authorized
12 when any one of the six circumstances listed in section 3142(f)(1)
13 and (2) is present, including flight. These courts have further
14 held that detention can be ordered in a case that involves one of
15 those factors in which the judicial officer concludes that no
16 condition or combination of conditions will reasonably assure the
17 appearance of the person as required and the safety of any other
18 person and the community.

19 For example, in United States v. Byrd, 969 F.2d 106, 109-10
20 10 (5th Cir. 1992), the Fifth Circuit expressly held that "\$ 3142(f)
21 does not authorize a detention hearing whenever the government
22 thinks detention would be desirable, but rather limits such hearings
23 to the [six circumstances listed in (f)(1)(A), (f)(1)(B), (f)(1)(C),
24 (f)(1)(D), (f)(2)(A) and (f)(2)(B)]." It noted that, "A hearing
25 can be held only if one of the six circumstances listed in (f)(1)
26 and (2) is present" and that "[d]etention can be ordered, therefore,
27 only 'in a case that involves' one of the six circumstances listed
28 in (f), and in which the judicial officer finds, after a hearing,

1 that no condition or combination of conditions will reasonably
2 assure the appearance of the person as required and the safety of
3 any other person and the community." Id. (detention denied because
4 "[t]he government has not shown ... that any one of the six listed
5 circumstances that warrants pre-trial detention is present in this
6 case."). See also U.S. v. Singleton, 182 F.3d 7, 9 (D.C. Cir.
7 1999) ("The Act establishes procedures for each form of release, as
8 well as for temporary and pretrial detention.... First, a judicial
9 officer must find one of six circumstances triggering a detention
10 hearing. See 18 U.S.C. § 3142(f). Absent one of these
11 circumstances, detention is not an option. Second, assuming a
12 hearing is appropriate, the judicial officer must consider several
13 enumerated factors to determine whether conditions short of
14 detention will 'reasonably assure the appearance of the person as
15 required and the safety of any other person and the community.' 18
16 U.S.C. § 3142(g). The judicial officer may order detention if these
17 factors weigh against release."); United States v. Ploof, 851 F.2d
18 7, 10 (1st Cir. 1988) ("§ 3142(f) does not authorize a detention
19 hearing whenever the government thinks detention would be desirable,
20 but rather limits such hearings to the following instances [listing
21 six factors under § 3142(f)(1) and (2) including] "upon motion of
22 the government or the court's own motion in a case that involves a
23 serious risk of flight, § 3142(f)(2)(A);" "Congress did not intend
24 to authorize preventive detention unless the judicial officer first
25 finds that one of the § 3142(f) conditions for holding a detention
26 hearing exists;" remanded for consideration of "whether or not there
27 is a serious risk defendant will engage or attempt to engage in the
28 conduct set forth in § 3142(f)(2)(B) and that no condition or

1 combination of conditions set forth in § 3142(c) will reasonably
2 assure the safety of any other person and the community"); United
3 States v. Himler, 797 F.2d 156, 160 (3rd Cir. 1986) ("[I]t is
4 reasonable to interpret the statute as authorizing detention only
5 upon proof of a likelihood of flight, a threatened obstruction of
6 justice or a danger of recidivism in one or more of the crimes
7 actually specified by the bail statute.

8 In the recent case of United States v. Fidler, __ F.3d __, 2005
9 WL 1950002 (9th Cir., July 21, 2005), the Court found it proper to
10 consider danger to the community in a case which involved flight,
11 but did not involve a crime of violence or any of the other
12 triggering factors in §3142(f)(1). In that case, Fidler was charged
13 with criminal contempt for violating a court order in a fraud case.
14 The government moved for detention based on flight risk and danger.
15 The district court instead ordered the defendant released on a
16 \$300,000 bond. The defendant was unable to post the bond, and was
17 unsuccessful in getting it reduced, and therefore remained in
18 custody pending trial. He appealed to the Ninth Circuit claiming
19 that the district court's order violated §3142(c), which prohibits
20 the judicial officer from imposing a financial condition that
21 results in detention. The Court rejected this argument, holding
22 that the de facto detention under these circumstances does not
23 violate §3142(c) "if the record shows that the detention is not
24 based solely on the defendant's inability to meet the financial
25 condition, but rather on the district court's determination that the
26 amount of the bond is necessary to reasonably assure the defendant's
27 attendance at trial or the safety of the community." (Slip op. at
28 2). The Court continued: "This is because, under those

1 circumstances, the defendant's detention is "not because he cannot
2 raise the money, but because without the money, the risk of flight
3 [or danger to others] is too great." Id. (Brackets in original).

4
5 B. The Defendants Are Charged With a "Crime of
Violence" Within the Meaning of the Detention Statute

6 Defendants are charged with making false statements to agents
7 of the FBI. To convict the defendants of these charges, the
8 government must prove the following elements:

- 9 (1) The defendant made a false statement in a
10 matter within the jurisdiction of the FBI;
11 (2) The defendant acted willfully, that is deliberately
and with knowledge that the statement was untrue;
12 (3) The statement was material to the FBI's
13 activities or decisions.

14 Ninth Circuit Pattern Instruction 8.66 (2003); United States v.
15 Camper, 384 F.3d 1073, 1075 (9th Cir. 2004); United States v. Boone,
16 951 F.2d 1526, 1544 (9th Cir. 1991).

17 Additionally, to make defendant eligible to receive the
18 statutory maximum term of eight years, the government must prove
19 that the offense "involves international or domestic terrorism" as
20 defined in section 2331 of Title 18. That section provides:

21 (1) the term "international terrorism" means
22 activities that -

23 (A) involve violent acts or acts dangerous to human
24 life that are a violation of the criminal laws of the
25 United States or of any State, or that would be a
criminal violation if committed within the jurisdiction
of the United States or of any State;

26 (B) appear to be intended -

27 (i) to intimidate or coerce a civilian population;

28 (ii) to influence the policy of a government by
intimidation or coercion; or

1 (iii) to affect the conduct of a government by mass
2 destruction, assassination, or kidnapping; and

3 (C) occur primarily outside the territorial
4 jurisdiction of the United States, or transcend national
5 boundaries in terms of the means by which they are
6 accomplished, the persons they appear intended to
7 intimidate, or the locale in which their perpetrators
8 operate or seek asylum.

9
10 (5) the term "domestic terrorism means" activities that -

11 (A) involve acts dangerous to human life that are a
12 violation of the criminal laws of the United States or
13 of any State;

14 (B) appear to be intended -

15 (i) to intimidate or coerce a civilian population;

16 (ii) to influence the policy of a government by
17 intimidation or coercion; or

18 (iii) to affect the conduct of a government by mass
19 destruction, assassination, or kidnapping; and

20 (C) occur primarily within the territorial
21 jurisdiction of the United States.

22 As previously noted, a detention hearing may be triggered under
23 §3142(f)(1) "upon motion of the attorney for the Government in a
24 case that involves - (A) a crime of violence." A "crime of
25 violence" is defined as "(a) an offense that has as an element the
26 use, attempted use, or threatened use of physical force against the
27 person or property of another; or (b) any offense that is a felony
28 and that, by its nature, involves a substantial risk that physical
force against the person or property of another may be used in the
course of committing the offense." 18 U.S.C. § 16.

At trial, the government will be required to show that the
defendant's lies related to international or domestic terrorism,
that is, that it involved "violent acts or acts dangerous to human

1 life." The government respectfully submits that this makes
2 defendants' case one that "involves a crime of violence."

3 CONCLUSION

4 For the foregoing reasons, the government respectfully submits
5 that this court should not reconsider Magistrate Judge Nowinski's
6 detention order, but that if the court chooses to do so, it should
7 find that the order was proper.

8 DATED: August 23, 2005

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